



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 29, 1994

Ms. Suzanne E. Giesecke  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR94-839

Dear Ms. Giesecke:

The Texas Department of Agriculture (the "department") has asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The department's request was assigned ID# 28865.

The department received the following request:

When it is complete, please provide me, as the attorney for Eloyed Bendele, with a copy of the incident report in the referenced case.

The request referenced a particular pesticide incident. The department submitted to this office as responsive to that request the complete investigative file, which it contends is excepted from disclosure under section 552.103(a). To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated in a judicial or quasi-judicial proceeding and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. This office has been provided information showing that litigation is reasonably anticipated. Our review of the investigative file shows that it is related to the anticipated litigation. The department has therefore met its burden of showing that the requested information relates to pending litigation for purposes of section 552.103(a).

However, some of the information in the file may not be withheld from disclosure. Absent special circumstances, once all parties to the anticipated litigation have had access to the information at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). We have marked information in the file that has been seen by the opposing party in the anticipated litigation.

The information at issue that has not previously been disclosed to the opposing party in the anticipated litigation may be withheld from disclosure under section 552.103(a). We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. Also, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the department's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

RHS/rho

Ref.: ID# 28865

Enclosures: Submitted document

cc: Mr. David B. Black  
2000 Smith Street  
Houston, Texas 77002  
(w/o enclosures)